

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

CESAR SOLANO-HERNANDEZ,
Defendant.

No. CR-06-021-FVS

FINDINGS AND CONCLUSIONS

THE DEFENDANT came before the Court for sentencing on July 17, 2006. He was represented by Charles E. Woode; the government by Russell E. Smoot. This order serves to memorialize some, but not all, of the Court's oral findings and conclusions.

Apprendi Binding Until Overruled

The defendant argues that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 1226, Ed.2d 350 (1998), have been implicitly overruled by *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). Believing, as he does, that these cases have been overruled implicitly, he argues that counting his prior convictions will violate the Sixth Amendment because he has not stipulated to their validity and a jury has not found them valid beyond a reasonable doubt. This argument is foreclosed by *United States v. Brown*, 417 F.3d 1077, 1078-79 (9th

1 Cir.2005) (*per curiam*), among other authorities.

2 Prior Convictions May Not Be "Grouped"

3 Part D of Chapter 3 provides for the grouping of offenses. It
4 does not provide for the grouping of prior convictions.

5 C. Assault Convictions Are Unrelated

6 The defendant seems to be arguing that his 2003 and 2004 assault
7 convictions (¶¶ 58 and 64 in the presentence investigation report)
8 are related within the meaning of Note 3 to U.S.S.G. § 4A1.2. In
9 order to establish that the two assaults are related, the defendant
10 must show that they are not separated by an intervening arrest and
11 that they were consolidated for sentencing. *Id.* The defendant
12 probably can satisfy the first requirement. It is unlikely the two
13 assaults were separated by an intervening arrest. However, the
14 defendant cannot satisfy the second requirement. Insofar as ¶ 58 is
15 concerned (3^o Assault), the defendant was sentenced on November 20,
16 2003, in superior court. Insofar as ¶ 64 is concerned (4^o Assault),
17 the defendant was sentenced on April 12, 2004, in municipal court.
18 Finally, even if the Court treats the two convictions as related and
19 assigns only one point to the two of them, the defendant still has 5
20 criminal history points which means he remains in Criminal History
21 Category III.

22 No Basis for Departure

23 The Court is mindful it has discretion to depart downward based
24 upon the grounds asserted by the defendant. Being fully aware of its
25 discretion, the Court declines to depart. In a word, the defendant's
26 case is not extraordinary.

1 Advisory Guideline Range

2 The defendant was not a minor participant and he does not
3 qualify for the two-level reduction provided by U.S.S.G. §
4 2D1.1(b)(7). Consequently, his adjusted offense level is 31. Since
5 he falls in Criminal History Category III, his advisory Guideline
6 range is 135-168 months.

7 18 U.S.C. § 3553(a)

8 The defendant is 26 years old. This is his second felony
9 conviction. Until now, he has never been incarcerated for more than
10 30 days, and that in a county jail. However, the defendant has
11 admitted that he participated in the sale of approximately one pound
12 of methamphetamine for the sum of \$12,500. This is a significant
13 transaction. Having reviewed the record, the Court is satisfied that
14 the defendant is not less culpable than Ismael Martinez-Solano, his
15 co-participant. Although the latter has received a less severe
16 sentence, the difference is largely a function of very different
17 criminal histories. For these reasons and the reasons the Court
18 indicated at the defendant's sentencing hearing, the Court concludes
19 that a sentence of 135 months imprisonment is appropriate.

20 Mandatory Minimum

21 The defendant stipulated to accountability for 441.9 grams of a
22 substance containing methamphetamine. He further stipulated that the
23 substance is 49% pure, which means he is accountable for 216.5 grams
24 of "actual" methamphetamine. If he is sentenced based upon the 441.9
25 grams of a substance containing methamphetamine, the mandatory
26 minimum is 60 months. 21 U.S.C. § 841(b)(1)(B)(viii). By contrast,

1 he is sentenced based upon the 216.5 grams of "actual"
2 methamphetamine, the mandatory minimum is 120 months. 21 U.S.C. §
3 841(b)(1)(A)(viii). The Court need not determine which minimum
4 applies because the prison term that the Court is imposing, *i.e.*, 135
5 months, is greater than either mandatory minimum.

6 **IT IS HEREBY ORDERED:**

7 The defendant's motion to depart (**Ct. Rec. 74**) is denied.

8 **IT IS SO ORDERED.** The District Court Executive is hereby
9 directed to enter these Findings and Conclusions and furnish copies
10 to counsel.

11 **DATED** this 25th day of July, 2006.

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13 s/ Fred Van Sickle
Fred Van Sickle
United States District Judge
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